TORTS—MALPRACTICE—EFFECT OF PLAINTIFF'S CONSENT IN BARRING CIVIL ACTION.—In an action on the case brought to recover damages for malpractice while performing an operation to procure an abortion on the plaintiff, and for unskilled treatment subsequent to the operation, the defendant, a surgeon, demurred to the complaint on the ground that since the plaintiff consented to an illegal operation she could not recover. *Held*, that the plaintiff could recover, since consent to allow an illegal act to be performed upon oneself does not constitute a defense to an action against the doer of the act to recover the actual damages suffered. *Lembo v. Donnell* (1918, Me.) 103 Atl. 11.

Consent to an act *prima facie* a tort is ordinarily a good defense to a civil action on the principle *"volenti non fit injuria."* See *Cole v. Searfass* (1912) 49 Ind. App. 334, 97 N. E. 345. But it is clear that such a defense may be no answer to a criminal charge. *Commonwealth v. Collberg* (1875) 119 Mass. 350, 20 Am. Rep. 328. For criminal law is concerned not with the injury to the individual but with the injury to society. To hold, however, that the criminality of the act makes the consent inoperative to bar recovery in a civil action, when the same consent to a lawful act would bar recovery, amounts in effect to allowing a plaintiff to recover by virtue and only by virtue of his having transgressed. There is, then, logical reason for attacking the decision in the principal case; and in a very similar case the opposite result was reached. *Goldnamer v. O'Brien* (1896) 98 Ky. 569, 33 S. W. 831. Yet the instant decision is supported by another abortion case. *Miller v. Bayer* (1896) 94 Wis. 123, 68 N. W. 869. Similarly, in cases where breach of the peace is involved, the great weight of authority holds that consent bars neither party from recovery for injuries sustained. *Shay v. Thompson* (1884) 59 Wis. 540, 18 N. W. 473; *contra, Lykins v. Hamrick* (1911) 144 Ky. 80, 137 S. W. 852. This has been explained on the not very illuminating ground that wilful hurt is not excused by consent, if it has no reasonable object. Pollock, *Torts* (10th ed.) 168. There are other cases where the law finds public policy better served by regarding the plaintiff's consent as inoperative in order that, by encouraging civil actions, the criminal may be the more readily detected. *Webb v. Fulchire* (1843) 25 N. C. 485 (recovery in quasi-contract of money lost in a shell game); but see *contra, Stewart v. Wright* (1906, C. C. A. 8th) 147 Fed. 321. In the former case a distinction is taken between the habitual law-breaker and the person led only momentarily into breaking the law. The more numerous jurisdictions appear to accord with the rule which helps the "unfortunate" to indemnify himself at the expense of the "knave." It is an important and perhaps doubtful question, in determining the wisdom of allowing the civil action, how far this in practice accomplishes the purpose of securing the criminal punishment of the knave. But even if he escapes the state, it may be that public policy is well served by penalizing him at least to the extent of making him recompense the plaintiff. The case has been discussed thus far as if the tort consisted solely in the illegality of the operation. The plaintiff alleged, however, not merely an illegal operation, but negligence in the performance of it and in the treatment after the operation. To such negligence there was of course no consent. The defense, if any, must be that the plaintiff was *particeps criminis;* that one who engages with another in a criminal enterprise must assume all risks of injury; that the law will not aid either to recover against the other for injuries resulting from the way in which the criminal design was carried out. *Cf. Gilmore v. Fuller* (1902) 198 Ill. 130, 65 N. E. 84. Here again we come back to a question of public policy. If both parties are to be regarded as equally guilty and the injury flows directly from the criminal act, it seems both sounder principle and better policy to leave the loss where it falls. Where, as in the principal case, one party may be regarded as the victim of sudden and overpowering tempta-

tion and the other as a professional criminal dangerous to the community, the rule which tends most to the exposure of the latter is perhaps to be preferred.

TORTS—TELEGRAPH COMPANIES—FAILURE TO DELIVER TELEGRAM CONTAINING OFFER OF EMPLOYMENT.—The plaintiff had sent a telegram to a baseball club offering his services. The telegraphic counter-offer of the club was never delivered; the plaintiff consequently lost an opportunity he would have accepted, and was subsequently unable to secure similar work. The defendant had notice of the telegram's importance, but failed to deliver because of an error in transmission. *Held*, that the plaintiff could recover compensatory damages. *Pfiester v. Western Union Tel. Co.* (1918) 282 Ill. 69, 118 N. E. 407.

When an undelivered telegram contains an acceptance of an *offer* to contract, recovery is permitted the sender against the company. *Western Union v. Blackwell Co.* (1909) 24 Okla. 535, 103 Pac. 717. Nor is there any reason why the addressee should not also be allowed recovery. *Cf. Penobscot Fish Co. v. Western Union* (1916) 91 Conn. 35, 98 Atl. 341, and note thereon (1917) 26 YALE LAW JOURNAL, 252. Courts have indeed refused him a remedy against the company where a message arrived, but was altered in transmission; but this has been on the theory that the addressee of an offer can hold the sender on the contract according to the offer as transmitted; leaving to the sender the remedy against the company. *Ayer v. Western Union* (1887) 79 Me. 493, 10 Atl. 495; and *cf. Sherrerd v. Western Union* (1911) 146 Wis. 197, 131 N. W. 341; see also COMMENTS (1918) 27 YALE LAW JOURNAL, 932, 933. But where an *acceptance* wholly fails to arrive, although a contract may have been completed by its sending, it seems clear that in practice this hardly protects the addressee; on the contrary, his troubles are likely to be increased by holding him bound by a contract of which he has no knowledge. In such cases, therefore, remedy should be given him directly against the company. This is borne out by the cases on undelivered offers. There the propriety of suit by the addressee seems admitted; recovery is contested only on the ground of uncertainty as to whether he would have accepted. Remedy has been denied him on this ground. *Beatty Lumber Co. v. Western Union* (1903) 52 W. Va. 410, 44 S. E. 309; see also Ann. Cas. 1914 C 209. But the probability of acceptance is now generally and properly considered a question of fact. *Western Union v. Sights* (1912) 34 Okla. 461, 126 Pac. 234; *Postal Tel. Cable Co. v. Talerico* (1911, Tex. Civ. App.) 136 S. W. 575. Recovery being allowed, the measure of damages in cases of undelivered or wrongly transmitted offers or acceptances of contract other than employment is, as in an action for breach of the contract, the loss actually sustained, or the profit which would have been made, or both. *Western Union v. Sights, supra; Postal Tel. Cable Co. v. Talerico, supra; Hasbrouck v. Western Union* (1899) 107 Iowa, 160; 77 N. W. 1034. Where employment is offered, if it is not for a definite period but terminable at will, compensatory damages cannot be recovered, the theory being that the damages are too uncertain to be estimated. *Larsen v. Postal Tel. Co.* (1911) 150 Iowa, 748; 130 N. W. 813. *Merrill v. Western Union* (1886) 78 Me. 97, 2 Atl. 847. But see *Western Union v. McKibben* (1887) 114 Ind. 511, 14 N. E. 894. But where the period of the contract is definite, the injured party is held entitled to full compensatory damages. *Western Union v. Valentine* (1885) 18 Ill. App. 57; *McGregor v. Western Union* (1900) 85 Mo. App. 308. See also 37 Cyc. 1766. The principal case properly follows the latter rule, and since the plaintiff used due diligence in attempts to find other employment, permits a recovery not only for the contract salary, but also for loss of reputation and skill, through lack of practice.